

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHS NORDBANK	:	CIVIL ACTION
	:	
v.	:	
	:	
M/V AHMETBEY,	:	
ODIN DENIZCILIK	:	NO. 03-3520

**Padova, J.**

**MEMORANDUM**

**November 18, 2003**

Following an auction for the sale of the motor vessel Ahmetbey, both Defendants and disappointed bidders filed motions opposing the confirmation of the sale and requesting that the Court order a new sale. On November 14, 2003, the Court entered an order denying these motions in their entirety and confirming the sale of the Ahmetbey. This memorandum sets out the Court's reasoning.

**I. RELEVANT BACKGROUND**

Plaintiff HSH Nordbank ("Plaintiff", or "Bank") filed an action against the vessel M/V Ahmetbey, in rem, and Odin Denizcilik, in personam, seeking judgment against Defendants for money due and unpaid under a loan agreement and enforcement of a mortgage on the M/V Ahmetbey by the sale of the vessel. A bench trial was held on this matter on September 23 through September 25, 2003. The Court subsequently ruled in favor of Plaintiff and against Defendants in the preliminary amount of \$805,591.73, to be amended by motion to include additional per diem interest subsequently accrued. The Court further ordered that the M/V Ahmetbey be sold by the United States Marshal in accordance with

the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, and that Plaintiff should recover its judgment from the proceeds of such sale. On November 5, 2003, an auction of the M/V Ahmetbey was conducted. Orient Shipping of Rotterdam, bidding on behalf of Goldfish Shipping, submitted the winning bid of \$2,350,000.00. In accordance with the notice of sale ordered by the Court, Goldfish Shipping provided certified funds in the amount of \$235,000.00 to the United States Marshal at the time of sale. Plaintiff filed a motion for confirmation of the sale of M/V Ahmetbey, and Goldfish Shipping joined in that motion. On November 13, 2003, Defendants and Azure Maritime (hereinafter, "Objectors"), a disappointed bidder, collectively filed a motion in opposition to the confirmation of sale. Both Defendants and Azure Maritime are represented by Ms. Ann-Michele Higgins, of Rawle and Henderson. Ms. Higgins was present at the November 5th auction and bid on behalf of Azure Maritime. Pyramid Shipping, another disappointed bidder, filed a separate motion in opposition to confirmation of the sale. The Court held a hearing regarding the confirmation of sale on November 13, 2003. On November 14, 2003, the Court entered an order confirming the sale of the Ahmetbey and overruling all of the objections to the sale lodged by the parties.

## II. OBJECTIONS OF DEFENDANTS AND AZURE MARITIME TO CONFIRMATION

"Whether a marshal's sale shall be confirmed is largely a matter of sound judicial discretion." Christian v. Sewer, 962 F.Supp. 673, 675 (D. V.I. 1997). "The bid at the marshal's auction does not consummate a sale. It is the equivalent of an offer to the court, not accepted until judicially confirmed. Until confirmation, the auction bid may be rejected." First Nat. Bank of Jefferson v. M/V Lightning Power, 776 F.2d 1256, 1261 (5th Cir. 1985). However, the "policy of inspiring confidence in sales under the supervision of the court favors confirmation of a sale made to the highest bidder at a fairly conducted public auction." Salazar v. Atlantic Sun, 881 F.2d 73, 81 (3d Cir. 1989)(citations omitted). Thus, "[a]bsent fraud or collusion, a bid at a judicial sale should not ordinarily be rejected . . . but 'the court has power to do so if the price is so grossly inadequate as to shock the conscience.'" M/V Lightning Power, 776 F.2d at 1261 (citations omitted). Thus, absent fraud or collusion, there generally must be at least some evidence of prejudice to the parties resulting from alleged improprieties at the auction for a Court to rescind a sale. Christian, 962 F.Supp. at 675 (citing Wong Shing v. M/V Mardina Trader, 564 F.2d 1183, 1189 (5th Cir. 1977)).

### A. Inadequacy of Notice of Sale

Objectors argue that the notice of sale provided by the Court (and drafted by the Bank) was defective on its face, and further

that the law firm representing the Bank, Hollstein, Keating, Cattell, Johnson and Goldstein ("Hollstein Keating"), did not take adequate steps to respond to queries of potential bidders concerning the logistics of the auction. Objectors argue that the resulting confusion among potential bidders may have prevented them from bidding on the vessel. Specifically, Azure Maritime objects to the language in the notice stating that "a cash deposit of ten percent (10%) of the bid shall be paid at the time of sale, and, if the sale is confirmed by the Court, the remaining ninety percent (90%) shall be paid within three (3) days after the date of confirmation." (See 10/9/03 Order, Docket # 65)(emphasis added). Azure Maritime argues that a potential bidder by the name of Demetrious Kalogerakis, who was retained by two separate parties to bid on the vessel, interpreted this provision to require that the down-payment be made in actual cash, as opposed to a certified or cashier's check. Objectors further argue that Mr. Kalogerakis attempted to contact Mr. Edward Cattell, of Hollstein Keating, by email to clarify this issue and receive additional information before the date of the sale, and received no response. According to Objectors, without the additional information Mr. Kalogerakis' principals were unable to make an informed decision regarding their purchase.

There is no merit to Azure Maritime's argument that the notice was defective on its face. It is generally understood that, in

business affairs, certified funds are recognized as legally equivalent to cash. See City Check Cashing v. Jul-Ame Constr. Co., 742 A.2d 141, 151 (N.J. Super. 1999)(overruled on other grounds by City Check Cashing, Inc. v. Maunfac. Hanover Trust, 764 A.2d 411 (N.J. 2001))("Certified checks are commonly used in the business and commerce of this county. Most persons consider a certified check to be virtually equivalent to cash. Certifying a check signifies to the world that a certifying bank has cash on hand to cover the check.") (citing Edwards v. Nat. City Bank of New York, 269 N.Y.S. 637, 639 (N.Y. Mun. Ct. 1934)). Numerous loan agreements are written with the implicit assumption that payment in "cash" can be made by certified check. In In Re. Wagner, 174 B.R. 189 (W.D. Pa.), the contract between the debtor and creditor stated, in relevant part, that:

If you wish to purchase the property, the terms are "cash" . . . In other words you must have your financing arranged with another lender and have the full payment price set out above in the form of a cashier's or certified check at the closing.

Id. at 193-94. The brief submitted on behalf of Pyramid Shipping recognizes this fact when it states that "Certified funds are recognized as the legal equivalent of cash." (Pyramid Shipping Opp. Sale, Mem. at 3.)

Indeed, as Azure Maritime points out, the concept of providing hundreds of thousands of dollars in cash as a down payment would have been logistically untenable. This fact alone

should have put all of the potential bidders on notice of at least the likelihood that a certified check would have been accepted for the down payment.<sup>1</sup> Thus, the Court rejects Azure Maritime's argument that the notice was defective on its face.

Objectors also argue that Mr. Cattell's failure to respond to Mr. Kalogerakis' queries in a timely manner prevented Mr. Kalogerakis' clients from procuring the funds necessary to bid on the ship. Mr. Kalogerakis testified that, after obtaining Mr. Cattell's email address from a website listing auctions of maritime vessels, he attempted to contact Mr. Cattell on Friday, October 31, 2003, by email to obtain more information about the details of the auction, but received no response.<sup>2</sup> (11/13/03 N.T. at 38.) According to Mr. Kalogerakis, he was able to contact Hollstein

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<sup>1</sup> It should also be noted that Defendant Odin Denizcilik did not object to the language in the notice of sale when the Bank submitted the language for the Court's approval. When presented with this fact, Ms. Higgins indicated that she was making the objection on behalf of Azure Maritime only. There is evidence in the record that both Defendant Odin Denizcilik and Azure Maritime are controlled by the Karahasan Group, and thus it is unclear whether Odin and Azure Shipping are separate entities. (See Def's Obj. Sale, Ex. C.) The Court need not resolve this issue, however, as it rejects Azure Maritime's argument on the merits.

<sup>2</sup> According to Mr. Kalogerakis, he sent five separate emails to Mr. Cattell. (11/13/03 N.T. at 21.) However, Mr. Kalogerakis admitted that all five of these emails were sent within a one hour period, and that some were sent within five minutes of one another. (11/13/03 N.T. at 38-39.) Mr. Cattell admits to having received the first such email, but notes that the subsequent emails, if sent, were likely filtered out by spam filtering software. (Id.) Given the unusual method in which the emails were sent, the Court considers relevant only the first email, which Mr. Cattell agrees he received.

Keating by telephone on Monday, November 3, 2003 (two days before the auction), and learn the details of the auction, including where the ship was and when he could inspect it. Mr. Kalogerakis testified that, after he inspected the vessel and reported the details back to his clients, one of his clients, Tiga, was interested in bidding on the ship up to the amount of \$2,527,000.00 but was unable to procure the ten percent deposit in certified funds by the day of the auction. (11/13/03 N.T. at 23.) According to Mr. Kalogerakis, had he been given his requested information in a more timely manner, it is likely that Tiga would have been able to procure the certified funds and bid on the ship. (Id.) Objectors therefore contend that Mr. Cattell's failure to reply to Mr. Kalogerakis' email in a timely manner improperly prevented a potential buyer from bidding on the Ahmetbey.

This argument is without merit. The notice of sale approved by the parties and the Court contains the telephone number of Mr. Cattell, and directs interested parties to contact this number for more information. There is no email address listed on the notice of sale. (See 10/9/03 Order, Docket # 65.) According to Mr. Kalogerakis, he never saw this notice of sale, because he does not read the newspapers where the notice of sale was published. (11/13/03 N.T. at 40.) Mr. Kalogerakis apparently obtained Mr. Cattell's email address from a website maintained by a third party, which did not contain Mr. Cattell's phone number. However, there

is no evidence that this website was in any way maintained or controlled by the Bank or any other party to this action. Because there is no evidence the Bank did not comply with the publication requirements ordered by the Court and dictated by the Rules of Admiralty, the Bank cannot be held responsible for the fact that Mr. Kalogerakis never saw the Notice of Sale. Furthermore, because the notice of sale did not provide for contact by email, Mr. Cattell's failure to respond to Mr. Kalogerakis' email cannot be said to have unfairly prevented potential buyers from bidding on the Ahmetbey.<sup>3</sup> Finally, the Court notes that Mr. Kalogerakis first attempted to contact Mr. Cattell on October 31st, a mere five days before the date of the sale, even though the sale date had been first advertised on October 17th. (See N.T. 11/13/03 at 43.) Thus, the inability of his client to place a bid is due at least in part to Mr. Kalogerakis' failure to act in a more timely manner.

B. Gross Disparity Between Sale Price and Fair Market Value of the Vessel

Courts are vested with discretion to set aside judicial sales where there is a gross disparity between the amount of the winning

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<sup>3</sup>There is certainly no evidence on this record of bad faith on the part of Mr. Cattell in failing to respond to the email. According to Mr. Cattell, the email address used by Mr. Kalogerakis is his personal email address. (11/13/03 N.T. at 40.) Mr. Cattell also indicated that he was traveling during the time period when Mr. Kalogerakis sent the email. (Id.) It is not uncommon for persons to fail to check their email for long periods of time when they are traveling.



bid and the fair market value of the vessel, and where there is a reasonable probability that a better price would be obtained if the Court conducted a resale. Latvian Shipping Co. v. Baltic Shipping Co., 99 F.3d 690, 692-93 (5th Cir. 1996); Kabkjian v. United States, 92 F. Supp. 2d 435 (E.D. Pa. 2000). A court can also order a resale where the amount of the winning bid is substantially exceeded by an upset bid, as such a bid can be a fair indication of the fair market value of the vessel. Latvian Shipping, 99 F.3d at 693. An upset bid is a bid in excess of the highest bid obtained at auction which is filed with the court prior to the confirmation hearing. Id. An upset bid must be a firm bid submitted to the Court, and not a speculative bid. Id. When evaluating the adequacy of the price bid for the ship, the Court is to consider the interests of all of the parties involved. For this reason, the fact that the price bid for the ship is adequate to satisfy all creditors' claims does not excuse the Court from determining whether a gross disparity between sale and market prices exists. See id.

Courts which have set aside judicial sales based upon gross inadequacy of a bid have done so where the fair market value of the vessel or the amount of an upset bid were more than 50% greater than the price of the winning bid. See Latvian Shipping, 99 F.3d at 693 (collecting cases); Tramp Oil v. Adriatic Tankers Shipping Co., 914 F. Supp. 527 (S.D. Fla. 1996). Indeed, in most cases in which a sale was set aside, the market value of the vessel was over double

the amount of the sale price. See Latvian Shipping, 99 F.3d at 693. Courts have exercised their discretion to confirm sales even in cases where an extreme disparity between market and sale price seemingly existed. For example, in Wong Shing, 564 F.2d at 1189, the court upheld the sale of a vessel for \$610,000.00 where the vessel had been previously purchased for \$1,500,000.00 and the vessel had been insured for \$2,000,000.00.

The Court finds, based upon the record before it, that the estimated market value of the Ahmetbey is not grossly disproportionate to the sale price of the ship (\$2,350,000.00). Objectors provided an unsworn declaration of a Mr. Meltern Aydin, who places the value of the Ahmetbey at between \$3,800,000.00 and \$4,080,000.00. (Def's Obj. Sale, Ex. D, "Aydin Dec.") However, Mr. Aydin admits that he has never inspected the vessel, and is basing his estimate merely on reference books and the value of similar vessels. (Id.) According to Mr. Aydin, vessels similar to the Ahmetbey sold at between \$3,200,000.00 and \$4,080,000.00. (Id.) Mr. Aydin provides no explanation for his assumption that the Ahmetbey would sell at the high end of that range.

Plaintiff submitted the unsworn declaration of Mr. Legger, who estimates the value of the Ahmetbey at \$3,000,000.00 in good condition. (11/13/03 N.T. Ex. G-2, "Legger Dec.") Furthermore, Mr. Legger notes that, because the Ahmetbey has been immobile for so long, it is highly likely that at least \$400,000.00 in repairs will

be necessary in order to return the Ahmetbey to good condition, placing the value of the ship at \$2,600,000.00. (Id.) Because Mr. Legger, unlike Mr. Aydin, explicitly took into account necessary repairs on the vessel, the Court must give more weight to Mr. Legger's assessment. Based upon Mr. Legger's assessment of the vessel, the market value of the Ahmetbey is clearly not grossly disproportionate to the sale price.

Objectors presented evidence of two potential upset bids. The first upset bid is based upon the testimony of Mr. Kalogerakis, and is in the amount of \$2,600,000.00. (11/13/03 N.T. at 33-34.) The second upset bid, submitted by Azure Maritime, is in the amount of \$3,650,000.00. (See Def's Opp. Sale., Ex. C, "Higgins Aff.")

An upset bid must be a firm bid to be considered in determining the adequacy of the price. See Wong Shing, 564 F.2d at 1189 (confirming sale where testimony concerning proposed upset bids was unclear and evasive.) Mr. Kalogerakis testified that one of his clients, Tiga, was prepared to offer \$2,600,000.00 for the Ahmetbey on the date of the hearing. (11/13/03 N.T. at 34.) However, Mr. Kalegarakis admitted that he did not have a check for the \$2,600,000.00 offer price or a check for the required 10% deposit with him at the hearing. (Id.) Moreover, Tiga's proposed bid is merely 11% higher than the price bid by Goldfish Shipping. Thus, Mr. Kalogerakis' testimony concerning a potential upset bid does not support a finding of gross inadequacy of price.

Objectors have also submitted an affidavit of Ms. Higgins, on behalf of Azure Maritime, in which she states that "Azure Maritime, Ltd. lists a bid of \$3,650,000, and seeks the purchase of the Ahmetbey." (Def's Opp. Sale, Ex. C, "Higgins Aff."). This bid is exactly 55% higher than the bid of Goldfish Shipping. The Affidavit indicates that Azure Maritime stood ready to make a 10% deposit within 24 hours of the date of the hearing. (Id.) Azure Maritime, however, actually bid on the Ahmetbey during the November 5th auction, and submitted a high bid of \$2,300,000.00. Furthermore, Ms. Higgins admits that she was not given authorization from Azure Maritime to place a bid of \$3,650,000.00 until after this Court issued an order setting the date for the confirmation hearing. (11/13/03 N.T. at 57.) This Order was entered on November 7, 2003, two days after the date of sale. Objectors argue that the atmosphere during the auction of the Ahmetbey was chaotic, and that therefore Ms. Higgins was unable to receive authorization via cellular phone from the principals of Azure Maritime to submit a bid higher than \$2,300,000.00 before the marshal ended the auction. This explanation lacks credulity. The Court finds nothing endemic to the sale process itself that prevented any party present from bidding what it chose. To the contrary, it appears that Azure Maritime's own disorganization and indecisiveness may have prevented it from submitting a higher bid for the Ahmetbey.

Because Azure Maritime participated in the bidding for the

Ahmetbey, and because it provides no satisfactory explanation for its failure to increase its bid at the sale for any amount it chose, the Court seriously questions whether the present upset bid of Azure Maritime can be considered firm and legitimate. In this regard, the Court notes that Azure Maritime did not come to the confirmation hearing with a check in hand for the proposed purchase price or even the ten percent down payment, but rather indicated that they could produce the down payment within twenty-four hours of the confirmation hearing. Moreover, the Court would be neglecting its responsibility to maintain public confidence in the bidding process if it rescinded a sale solely because a bidding party at the auction had a subsequent change of heart and wished to outbid the winner at a later date. The Court further notes that the price bid by Goldfish Shipping is only 11% lower than the only other potential upset bid, the \$2,600,000.00 bid of Tiga. The amount of Tiga's upset bid is identical to the value of the Ahmetbey as appraised by Mr. Diederik Legger. (11/13/03 N.T, Ex. G-2, "Legger Dec.") The Court therefore determines that there was no gross disparity between the price paid for the Ahmetbey and either its market value or the value of any legitimate upset bid.

### C. Collusion

Objectors argue that there may have been collusion between Orient Shipping (who bid on behalf of Goldfish Shipping) and other potential bidders during the auction to keep the auction price low.

Objectors ask for leave to take discovery on this question. Courts have rescinded judicial sales where collusion or a secret agreement between two parties unfairly prevented other parties from successfully bidding in the auction. See ANZ Grindlays Bank v. M/V Latini, No. 98-3680, 1999 U.S. Dist. Lexis 2778 (E.D. La. Feb. 17, 1999). Objectors provide virtually no support for their allegation of possible collusion. Mr. Kalogerakis did testify that Mr. Legger, the representative of Orient Shipping, approached him about the possibility of a joint venture. (11/13/03 N.T. at 34.)<sup>4</sup> Mr. Kalogerakis, however, testified that he told Mr. Legger that he was not interested, and that the conversation went no further. (Id.) Mr. Kalogerakis further testified that he had absolutely no idea what Mr. Legger was talking about when Mr. Legger asked him about a joint venture, and has no idea what, if anything, Mr. Legger stated to other parties at the auction. (11/13/03 N.T. at 34-35.) Thus, Objectors' request for leave to take discovery concerning possible collusion is denied.

### III. OBJECTIONS OF PYRAMID SHIPPING TO CONFIRMATION

Pyramid Shipping objects to the confirmation on the ground that many bidders who bid on the vessel had no cash or certified funds on hand to bid on the vessel, but were allowed to bid anyway, in contravention of the terms in the Notice of Sale requiring a cash

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<sup>4</sup>Mr. Legger disputes this allegation. (11/13/03 N.T., Ex. G-2, "Legger Dec.")

deposit of 10% at the time of the bidding. According to Pyramid Shipping, only it and Orient Shipping (bidding on behalf of Goldfish Shipping) had the required secured funds. Pyramid Shipping argues that, after consulting with Mr. Cattell, the Marshal conducting the auction allowed Mr. Kalogerakis and other bidders to bid notwithstanding the fact that they could not make the required deposit at the time that the sale was concluded.<sup>5</sup> The winning bidder, Orient Shipping, did have certified funds on hand, and did make the 10% deposit in certified funds. Pyramid Shipping argues that the decision of the Marshal was unfair to bidders, such as Pyramid, who did have the required funds on hand, because bidders without funds were allowed to artificially inflate the selling price of the vessel.

"The duties of an officer selling property at a judicial sale are ministerial in their nature; he must observe the requirements of the applicable law and comply with the decree or order of sale; but within those limits he is vested with reasonable discretion."

Quinn v. S.S. Jian, 235 F. Supp. 975, 977 (D. Md. 1964)(citing to 30A Am. Jur., Judicial Sales.) Moreover, a judicial officer confirming a sale has some discretionary power to modify an order directing a sale. Id. Thus, in Quinn, the Court upheld a sale where

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<sup>5</sup> Mr. Kalogerakis testified that he was told he could bid on the vessel on condition that, if his client was the winning bidder, he would be able to obtain certified funds for the required deposit later the same day. (11/13/03 N.T. at 45.)

the Marshal had allowed the winning bidder, who did not have cash on hand, to obtain a check for the deposit from a bank located down the street. Id. Furthermore, although maintaining public confidence in the bidding process is important, as noted, *supra*, a court should be very reluctant to rescind the sale of a ship where there is no evidence of prejudice to third parties. See Christian, 962 F. Supp. at 673.

First, it should be noted that Goldfish Shipping, the winning bidder, does not object to the confirmation of sale, and does not argue that the price it paid was artificially inflated by improper bidding. The price bid for the vessel, \$2,350,000.00, is certainly not high in comparison to the estimated value of the ship. Indeed, Objectors have argued to the Court that the sale price is too low. (See supra, § B.) It is not disputed that Goldfish Shipping did comply with the terms of the notice of sale and provided a deposit. It is also not disputed that Pyramid Shipping bid on the vessel, up to the amount of \$1,700,000.00. Pyramid indicates that it stopped bidding on the vessel in response to the improper bidding by those that did not have cash or certified funds on hand, and because of its belief that the Marshal did not have the auction under control. (See 11/13/03 N.T. at 64-65.) Pyramid further indicates that, if it had continued bidding, it would have bid the amount of \$2,500,000.00. (See 11/13/03 N.T. at 65.) Pyramid Shipping's argument that the alleged irregularities at the auction prevented



them from bidding \$2,500,000.00 on the ship, but did not prevent them from bidding \$1,700,000.00, strains the Court's credulity. Thus, Pyramid Shipping's objections to the Confirmation of Sale are overruled.

#### IV. CONCLUSION

For the foregoing reasons, all objections to the confirmation of sale of the M/V Ahmetbey are overruled, and the Motion of Defendants and Azure Maritime, and the Motion of Pyramid Shipping, requesting that the Court order a new sale are both denied in their entirety.

BY THE COURT:

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John R. Padova, J.